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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

THOMPSON VAN LINES, INC., *et al.*,

Appellants,

—v.—

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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Appellants,

—v.—

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of United States District Court for the District of Columbia dismissing appellants' complaint which sought to set aside an Order of the Interstate Commerce Commission, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The Memorandum Opinion of the United States District Court for the District of Columbia is not officially reported; but a copy is appended hereto as Appendix "A". A motion for a temporary restraining order was denied by the District Court [*Thompson Van Lines, Inc.* v. *United States,* 381 F. Supp. 184 (1974)]. The Report of the Interstate

Commerce Commission ("Commission") which incorporated the challenged Order and Rules of the Commission is reported in 119 M.C.C. 530 (1974). A copy of the Order and the Rules prescribed by the Order are appended hereto as Appendix F.

Jurisdiction

This suit was instituted under 28 U.S.C. §1336 to set aside the Order of the Commission. The judgment of the District Court was entered on April 28, 1975 and notice of appeal was filed in that Court on June 17, 1975. The time to docket the appeal was extended by this Court to September 15, 1975. The jurisdiction of the Supreme Court to review the judgment by direct appeal is conferred by Title 28 United States Code Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment of the District Court on direct appeal in this case: *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515 (1946); *United States* v. *Capital Transit Company,* 325 U.S. 357 (1945); *Rochester Telephone Corporation* v. *United States of America,* 307 U.S. 125 (1939).

Question Presented

May the Commission, by rules adopted in a general rulemaking proceeding, prohibit a motor carrier from combining its operating authorities where such combination has been exercised, under Certificates of Public Convenience and Necessity ("Certificates") issued by the Commission, with the knowledge, consent and approval of the Commission and may the Commission do so without observing the limitations and restrictions prescribed by the Interstate Commerce Act and the Administrative Procedure Act relating to the revocation, modification or suspension of a Certificate and does such prohibition constitute an impermissible revocation, suspension or modification of the Certificates?

Statutes Involved

Sections 207(a), 208(a) and 212(a) [49 U.S.C. §§307(a), 308(a) and 312(a)] of the Interstate Commerce Act, as amended ("Act") and Section 558(c) of the Administrative Procedure Act, as amended [5 U.S.C. §558 (Appendix "B")], are set forth in Appendix "E" hereto.

Statement

The appellants are motor common carriers engaged in the transportation of household goods in interstate commerce pursuant to Certificates of Public Convenience and Necessity issued by the Commission under Section 207 of the Act [49 U.S.C. §307]. The Certificates granted to the appellants authorized them to "tack" two separate segments of their respective operating authorities. To illustrate: appellants' Certificates authorized service from point "A" to point "B" and service from point "B" to point "C". By "tacking" at the common service point or gateway "B", the appellants could transport used household goods from point "A" to point "C". Appellants and other carriers have been "tacking" for many years with restriction or objection by the Commission.

On or about November 23, 1975, the Commission instituted a proposed rulemaking proceeding sparked, ostensibly, by the need for fuel conservation. After receipt of statements by those who favored and those who

opposed the Commission's proposal to restrict or prohibit tacking, the Commission adopted a series of Rules which provide, in effect, that if the circuitous mileage occasioned by observance of a gateway exceeds 300, tacking will be prohibited (27a). Petitions for reconsideration filed by various parties to the proceedings were denied by the Commission. The Commission, and the Court below, determined that the Commission could resort to rulemaking instead of case-by-case adjudication and, by a blanket rule, emasculate existing licenses.

The Question Is Substantial

The seminal issue involved in this appeal is whether the Commission, or any other administrative agency, under the guise, pretense or charade of general rulemaking may impair and destroy property rights. This issue is of importance not only to carriers who are subject to the Act but to all segments of our private enterprise system bound by the rules and regulations of the "headless fourth" branches of government whose participation in the free enterprise economy is more that of master than partner. More significantly, this appeal ought to be the occasion for declaring anew that ours is a government of laws and not of administrators acting without legislative or judicial sanction. If the Congress of the United States cannot confiscate property rights, may administrative agencies, by hermetic techniques, evade Constitutional inhibitions? If administrative agencies are no longer required to conform to statutory standards and are free to legislate, rather than articulate the law by filling in the interstices of legislation, then this Court, and not the agencies, must formulate this new and radical sempiternal principle. The polestar of

jurisprudence is finality, but finality is unattainable if agencies operating ubiquitously in all areas of economic and political activity, fashion, distort or reconstruct the law to satisfy their perceptions of what the law ought to be. What the Commission has done in this case, and other agencies will attempt to do, is to rewrite statutes (or impose their notions of what the law ought to say) and reject decisional precedents upon which our society relies for its sense of security of expectations.

The issue in this appeal, which this Court has never resolved, is whether an administrative agency may employ "rulemaking to amend some—but not all—of the outstanding certificates authorizing a particular kind of service so as to deprive the licensees of a significant part of their license authority". [*American Airlines, Inc.* v. *Civil Aeronautics Board,* 359 F. 2d 624, 635 (1966), cert. den. 385 U.S. 843 (1966) dissenting opinion.]

In short, this appeal invites this Court to reexamine the role of administrative agencies and to reconcile the dichotomy of rulemaking and adjudication. [Verkuil, Judicial Review of Informal Rulemaking, 60 Va. L. Rev. 185 (1974); Davis, The Doctrine of Precedent as Applied to Administrative Decisions, 50 W. Va. L. Rev. 111 (1957).]

Appellants conceded that if the Commission had authority to enact the challenged Rules then the substantial evidence of record supported their adoption. But this begs the question. Appellants suggest that the Commission had no authority to adopt the Rules and apply these, *ex cathedra,* to licensed cariers. Simply stated, this is not a case of improper exercise of power but rather the unlawful assumption of power and authority by the Commission and, as appellants contend, a clear violation of the Act.

Contrary to the statements by the District Court (Appendix A) appellants did not admit that the gateway elimination rule was "in the public convenience" (8a), nor that the policy changes "are rational examples" of the Commission's power (9a) nor that tacking is justified only if the Commission authorized it (9a). Appellants never stated that the past authorization of tacking was meaningless (10a).

1. Under Section 207 of the Act [49 U.S.C. §307], the Commission is authorized to issue to a qualified motor carrier a certificate permitting the transportation of property in interstate and/or foreign commerce.

Section 208(a) of the Act [49 U.S.C. §308] reserves to the Commission a precisely defined right to attach "such reasonable terms, conditions and limitations as the public convenience and necessity may from time to time require . . ." But this is not a sanction for a total or partial revocation of a license. The reach and ambit of Section 208(a) must be read co-jointly with Section 212(a) of the Act [49 U.S.C. §312(a)]. Section 212(a) provides that the Commission may suspend, change or revoke a certificate in whole or in part "for willful failure to comply" with the Act but only after notice and a hearing and an opportunity by the carrier to comply "with a lawful order" the Commission "commanding obedience" to the Act or to a rule or regulation issued by the Commission. Moreover revocation or suspension must meet the criteria enacted in Section 558 of the Administrative Procedure Act [5 U.S.C. §558(a)]. That Section 208(a) of the Act and Section 212(a) are coherent, independent and reconcilable statutory provisions was made clear in *Texas & Pacific Motor Transport Co.* v. *United States, et al.* [87 F. Supp.

107 (D.C. Tex. 1949), rev's'd on other grounds 340 U.S. 450 (1951), re'h'g den. 341 U.S. 706 (1951)] where the Court held:

> "Nor can revocation be accomplished in any way except under Sec. 212. It cannot be brought about by the imposition of terms and conditions, or, limitations. The Commission, itself, said in *Quaker City Bus Co.* v. *Black Hawk Lines, Inc.* that 'The existence of a certificate creates a vested motor carrier status which stays in force and effect * * * until that certificate is revoked in accordance with the procedure prescribed in Sec. 212 (a).'
>
> "If we give the Commission power to revoke by terms, limitations and conditions, by an attempted stretch of Sec. 208(a), then we make Sec. 212(a) utterly useless. Each Section has its purpose. Each Section expresses the intent of the Congress. Such intent must govern" (pp. 112-113).

2. Appellants contend that the Commission has partially revoked their Certificates, not only in violation of the Act but by an Orwellian obliteration of a long line of decisional precedents upon which appellants and other motor carriers relied in making investments and in devoting their energies and talents. Appellants' claim to the right to tack is supported by principles repeatedly enunciated and reaffirmed by the Commission. Thus, in *Fleetlines, Inc.* v. *Arrowhead Freight Lines, Ltd.* [54 M.C.C. 279, 285 (1952)], the Commission stated:

> "*The right of a motor common carrier to tack separate grants of authorities is well settled,* regardless of whether the authorities involve regular routes . . ." (emphasis supplied)

In *Motor Common Carriers of Property Routes and Service,* [88 M.C.C. 415, 417 (1961)], which involved a similar rulemaking proceeding, the Commission concluded that:

> "A certificate authorizing operations over two or more routes having one or more service points in common *confers the right to operate over all combinations* of such routes and between all the designated points thereon, unless the service is specifically restricted in the certificate. (citing cases)" (emphasis supplied.) (pp. 419-420)

3. In *United States* v. *Rock Island Motor Transit Co.,* [340 U.S. 419 (1951)] and in *United States* v. *Seatrain Lines, Inc.,* [329 U.S. 424 (1947)], this Court made clear that the Commission cannot impose limitations on either the freight to be handled or service to be performed under an existing certificate. In this case, we are not dealing with the right to modify authority "issued due to inadvertence" [*American Trucking Associations, Inc.* v. *Frisco Transportation Company,* 358 U.S. 133, 144 (1958)], but rather the use of rulemaking "as a guise for changing previous decisions" under the pretext of correction. (Cf. *Watson Bros. Transportation Co.* v. *United States,* [132 F. Supp. 905 (N.D. Neb. 1955) aff'd 350 U.S. 927 (1956)]; *Civil Aeronautics Board* v. *Delta Airlines, Inc.,* [367 U.S. 316 (1961)]; *Donald B. Zirbel—Investigation of Operations,* [53 M.C.C. 684 (1951)]; *Fox-Smythe Transportation Co.—Extension—Oklahoma,* [106 M.C.C. 1 1967)].

4. The plain fact is that the Commission did not have the option of proceeding by way of rulemaking or by case-by-case adjudication. The elimination of gateways reverses

a long-standing policy dictated by, and consistent with, the Act, and impairs vested rights. [*Garrett Freightlines, Inc. —Control and Merger—Inland Motor Freight and Pacific Highway Transport, Inc.,* 87 M.C.C. 23 (1960); *Hennepin Transportation Co., Inc.—Purchase—Oligney Motor Express Co.,* 80 M.C.C. 655 (1959); *George C. Rawlings—Extension—Emporia,* 78 M.C.C. 636 (1959)].

5. The right to tack two separate grants of authority at a common point reflects a coherent and unchallenged Commission policy, mandated by the Act; and this right has been withdrawn by the Commission only upon proof by opposing carriers that no service was performed in the territory covered by the authority sought to be tacked, coupled with a persuasive demonstration that their interests or operations will be adversely affected. [*H.N. Dahlsten-Fertilizer,* 1968 Fed. Car. Cas. (CCH) ¶36,245; *Liquid Transporters, Inc., Extension—Columbia Park, Ohio,* 76 M.C.C. 685 (1955); *Commercial Oil Transport Extension,* 76 M.C.C. 773, 777 (1958); *Eldon Miller, Inc., Extension—Utica, Ill.,* 74 M.C.C. 609, 610 (1958); *Home Transportation—Ball Bros.,* 116 M.C.C. 18 (1972).]

In *Howard Hall Company* v. *U. S.,* [332 F. Supp. 1076, 1082 (N.D. Ala., 1971)], the Commission's rejection of tacking restrictions was sustained by the Court:

> " . . . the tacking of two separate unrestricted irregular-route authorities is permissible *as a basic right incidental to the holding of such authorities* . . ." (emphasis supplied)

6. This case does not involve a prospective rule or a complainant who holds no license [*National Petroleum Re-*

finers Association v. *F.T.C.*, 482 F. 2d 672 (C.A.D.C. 1973)] nor is an instance of removing restrictions imposed on a whole class of carriers identically situated [*Regular Common Carrier Conference* v. *United States*, 307 F. Supp. 941 (D.D.C. 1969)]. This is simply a case of administrative action which, at best, is misguided and, at worst, is an arrogant assumption of power and authority which Congress never intended be exercised by the Commission.

Appellants submit that the District Court misread the Act and thereby vested the Commission with power to rewrite the Act. We believe that the question presented by this appeal is substantial and implicates issues which have transcendent political, economic and legal consequences for our society.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of District Court for the District of Columbia

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-860

THOMPSON VAN LINES, INC., and ALEXANDER B. POLLOCK, d/b/a JIFFY VANS,

Plaintiffs,

—v.—

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION,

Defendants.

MEMORANDUM OPINION

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Before:

McGOWAN, *Circuit Judge,* and
FLANNERY and WADDY, *District Judges.*

FLANNERY, *District Judge*:

This matter came before the court for hearing on the merits after briefing by the parties.[1] Previously, plaintiffs sought but were denied a temporary restraining order. *See* 381 F. Supp. 184 (D.D.C. 1974). Many of the relevant facts are set forth in the denial of the temporary restraining order and will not be repeated here. The court has jurisdiction under 28 U.S.C. § 1336 to hear this appeal from the Interstate Commerce Commission [ICC] proceeding. Pursuant to 28 U.S.C. §§ 2325, 2284, a three-judge court was convened.

[1] Since no factual issues were in dispute, the court set up a briefing schedule so that the legal issues could be resolved. Although no motions for summary judgment were filed, the case is before the court as if on cross-motions for summary judgment.

The plaintiffs, irregular-route motor common carriers engaged in interstate transportation of household goods, seek to enjoin the ICC order issued in *Motor Common Carriers of Property, Routes and Service,* Ex Parte No. 55, Feb. 25, 1974, otherwise known as *Petition for the Elimination of Gateways by Rulemaking.* Upon petition from motor carriers the ICC, after initial investigation, commenced a rule making proceeding for the purpose of altering long-standing Commission policy regarding tacking at gateways. For many years the ICC permitted, but did not compel irregular motor carriers holding two separate certificates of public convenience and necessity to tack or combine the two routes if the routes had at least one point in common. In 1961, in *Motor Common Carriers of Property —Routes and Service,* 88 M.C.C. 415, 423-44 (1961) the Commission stated:

> Irregular-route carriers are permitted to tack their separate grants of authority in order that they may more efficiently utilize their equipment and facilities, but they are not, nor can they be, compelled to do so. The general requirement that motor common carriers provide adequate service (this requirement is found in section 216(b) of the act and is specifically included in every certificate issued to a common carrier) does not extend to service which may be provided through a combination of authorities.

And the Commission later clarified the basis for the carriers' right to tack:

> The right of a motor common carrier to provide a through service by combining two separate unrestricted irregular-route authorities at a point common to both

was firmly established in *Transport Corp. of Virginia Extension—Maryland,* 43 M.C.C. 716, 719. This right does not accrue because a need for a through service is established. Rather, it exists because of the fact that if two separate operating authorities were held by different carriers both could participate in an interline movement; hence, if the separate unrestricted authorities are held by the same carrier it may render the same through service as the two carriers could perform by interline.

Warren Transport, Inc., Extension—Dubuque to North Dakota, 98 M.C.C. 761, 763 (1965). The Commission, while permitting tacking of certificates has held to the belief that in appropriate circumstances, it may, pursuant to 49 U.S.C. § 308, [impose restrictions against tacking.] *E.g., Warren Transport, Inc., Extension—Dubuque to North Dakota, supra* at 763. Indeed, in *Transport Corp. of Virginia Extension—Maryland,* 43 M.C.C. 716, 719 (1944), the Commission, while permitting tacking in that case, stated that such decision

> should not be understood . . . as precluding the imposition by us in certificates of reasonable conditions against the rendition of through service in cases in which such conditions may be warranted by the evidence presented. Such power is specifically granted in section 208(a) [49 U.S.C. § 308] of the act, which authorizes us to impose in certificates such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier.

After years of permitting tacking, the ICC in 1973, in light of present-day problems of economy, environment, and the energy emergency, began to scrutinize the problem of permitting tacking in cases which resulted in undue circuity. The ICC tentatively decided that where the route via the gateway was considerably longer than the direct route motor carriers should be required to carry by the direct route, hopefully conserving much fuel in the process. The ICC was faced, however, with the problem of how to implement a change in its tacking policy and how to gain more information to determine finally that a change was in the public convenience and necessity. Relying upon its authority under 49 U.S.C. § 308(a), the ICC determined that:

> [T]he most, and perhaps only, feasible manner in which to accomplish the requisite authorization of such necessary services is by means of a general rule of construction applicable to the carriers' outstanding certificates, based upon a finding of public convenience and necessity on a national scale and containing appropriate safeguards against the conduct of operations which result, or which are reasonably certain to result, in destructive competition.

The Commission was relying in large part upon the decision in *Removal of Truckload Lot Restrictions,* 106 M.C.C. 455 (1968), *aff'd, Regular Common Carrier Conference* v. *United States,* 307 F. Supp. 941 (D.D.C. 1969), for its authority to proceed under 49 U.S.C. § 308(a). The Commission there had stated:

> [T]he power to attach terms, conditions, and limitations to certificates conferred by section 208(a) is a broad one; the standards are only that they must be

reasonable, and that they must be either required by the public convenience and necessity or necessary to implement any requirements established under section 204(a)(1) and (6).

In affirming the decision the District Court stated:

> Contrary to plaintiffs' argument no congressional mandate in the Interstate Commerce Act explicitly requires adjudication where a large number of certificates are affected at one stroke. Indeed, as the Commission noted . . . , Congress recognized that the Commission should be able to impose "such reasonable terms, conditions, and limitations" on certificates as the public convenience and necessity may *from time to time* require and expressly provided for such eventuality. 49 U.S.C. § 308(a) (1964). . . . The Commission should not be precluded from a periodic review on a national scale of certificates it has issued or from a determination whether the public interest requires a removal of certain limitations in the light of the public policy underlying the statute.

307 F. Supp. at 944-45 (emphasis in original).

The gateway elimination rule applies to all irregular-route motor common carriers whose certificates neither expressly permit nor prohibit tacking and provides in pertinent part that where circuity via gateways is too great, the carrier must observe the most direct route. This new policy is moderated somewhat under an ICC procedure that allows individual carriers to apply for permission to continue to carry via gateways. The plaintiffs in this action are irregular-route motor common carriers who have carried goods via gateways, depending upon the Commission's

long-standing policy of permitting tacking at gateways. Under the new rule, however, plaintiffs will be unable to carry via gateways unless they obtain special permission. The plaintiffs admit that there exists a rational basis for the rule and that there is substantial evidence in the record supporting the rule. Further, plaintiffs admit that the rule making proceeding carried out under 5 U.S.C. § 553 was completely fair. However, plaintiffs assert that the gateway elimination rule operates to amend or to revoke a part of their certificates since they now are unable to tack at gateways. Plaintiffs assert that any amendment or revocation of certificates must be via an adjudicatory hearing following the procedures of 49 U.S.C. § 312. Since the adjudicatory procedures of section 312 admittedly were not followed, plaintiffs argue that the rule is invalid and must be set aside.

In its present posture this case presents only two issues. The first is whether the gateway elimination rule constitutes an amendment or revocation of certificates requiring an adjudicatory procedure or whether it is an example of a reasonable term or limitation which the Commission can from time to time impose as the public convenience and necessity require. Second, if the gateway elimination rule does effect an amendment or revocation of certificates, may the Commission nevertheless proceed by rule making under *American Airlines, Inc.* v. *CAB*, 359 F.2d 624 (D.C. Cir. 1966).

As plaintiffs admit their certificates do not expressly confer the right to tack. Rather, plaintiffs have relied upon ICC policy to allow tacking. As stated earlier, where tacking has been permitted without express authorization in the certificate, there has been no finding that the public convenience or necessity required such service, and carriers

need not provide such "tacked" service. Nevertheless, plaintiffs argue that by permitting tacking for a long period, tacking has become, in essence, a basic part of the certificates of public convenience and necessity of those who choose to tack and that by now greatly restricting the ability to tack, defendants have revoked or amended those certificates without following the procedures of 49 U.S.C. § 312.

Under 49 U.S.C. § 308(a) the Commission, after issuance of a certificate, may from "time to time thereafter" attach "to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carriers. . . ." It is admitted that the gateway elimination rule is in the public convenience and necessity and that under 49 U.S.C. § 308(a) the Commission, upon proper findings, may attach reasonable terms, conditions, and limitations to a carrier's certificate without complying with the procedures in 49 U.S.C. § 312. Obviously, a line must be drawn between those reasonable terms that the Commission may attach under 49 U.S.C. § 308(a) and those changes which would constitute an amendment or revocation under 49 U.S.C. § 312.

The court begins with the understanding that an agency's interpretation of its own rules or policies is entitled to great deference. It has been the Commission's interpretation since as early as 1944 that under 49 U.S.C. § 308(a) prohibition of tacking was one of the reasonable terms, conditions, and limitations that the Commission could impose where the public convenience and necessity required it. *See Transport Corp. of Virginia Extension—Maryland, supra* at 719.

See also Warren Transport, Inc., Extension—Dubuque to North Dakota, supra at 763. Plaintiffs apparently agree that when a certificate of public convenience and necessity initially is issued, the ICC can prohibit tacking. However, once a carrier has exercised its right to tack, plaintiffs argue that that right cannot be taken away. But 49 U.S.C. § 308(a) expressly states that even after a certificate is issued, the Commission may make such reasonable changes or limitations as the public convenience and necessity require. Here it is admitted that the policy changes ordered in this matter are rational exercises of the agency's power to supervise motor carriers and that there is substantial evidence supporting the decision. As evidenced by the ICC's long-standing interpretation, this change of policy constitutes the kind of reasonable change or limitation upon the privilege of carrying goods which Congress instructed the Commission to make. As the court in *Regular Common Carrier Conference* v. *United States, supra* at 945, stated "[t]he Commission should not be precluded from a periodic review on a national scale of certificates it has issued or from a determination whether the public interest requires a removal of certain limitations in the light of the public policy underlying the statute."

The court is not persuaded that the right to tack constitutes a part of each carrier's certificate. As pointed out both in the Commission justification for the rule and at oral hearing, there are instances where the Commission expressly has found that tacking was required by the public convenience and necessity. Certainly in those cases tacking is a part of the certificate. However, in those cases where tacking merely has been permitted as a matter of general ICC policy without express incorporation in the certificate and without any finding that tacking is necessary for the

public convenience or necessity, the court finds that tacking stands on a different level. It constitutes a right of the carriers to tack in this latter situation only so long as the general Commission policy continues. When that Commission policy changes, it revokes nothing contained in the carrier's certificate and nothing which the Commission previously has found to be necessary for the public convenience or necessity. Plaintiffs argue that while the Commission sometimes expressly authorizes tacking and other times merely permits it, the two situations are for all purposes identical. In essence, plaintiffs feel that when the ICC has expressly authorized tacking in the past, it was meaningless. The court is unconvinced. Where tacking is not expressly authorized by certificate, the carrier is not compelled to do so. *Motor Common Carriers of Property—Routes and Service, supra* at 424. In contrast, where an express tacking provision appears in the certificate, the general requirement that the carrier provide adequate service would extend to service provided through a combination of authorities. *See id.* Indeed, the Commission itself, in the gateway elimination rules, acknowledged a difference between express tacking authorization in certificates and tacking permitted merely as a matter of ICC policy—the former certificates were not affected by the gateway elimination rules, presumably because there previously had been an express determination of need for that tacking in contrast to the tacking permitted merely on the basis of agency policy.

In sum, the court finds that where carriers have tacked their authorities in the past, absent express tacking authorization in the certificates, such tacking does not constitute such a part of their certificates that subsequent

change of ICC policy constitutes an amendment or revocation of the carriers' certificates. Rather, that change of ICC policy, consistent with long-standing ICC interpretation, constitutes the exercise of the ICC's obligation under 49 U.S.C. § 308a to attach reasonable terms and conditions to the privileges granted by the certificate. The court feels that the ICC must retain flexibility to reevaluate its policy and, where conditions require, to change that policy. In the instant case the agency was fair and thorough in its reevaluation of its gateway policy and all parties agree that the gateway elimination rule is supported by substantial evidence in the record and has a rational basis. Clearly the rule is in the public convenience and necessity. The court will uphold its validity.

Even if the court concluded that tacking constituted such a part of a carrier's certificate that its curtailment effected an amendment or revocation of certificates, the court still would uphold the rule in question. In its denial of the temporary restraining order, the court ruled that plaintiffs failed to show likelihood of success on the merits because of *American Airlines* v. *CAB, supra,* where the District of Columbia Circuit, *en banc,* ruled in similar circumstances that the Civil Aeronautics Board could proceed by rule making rather than adjudication. In denying the temporary restraining order this court quoted extensively from *American Airlines* and noted only the following reservation:

> Whether the present case, because of greater affirmative action required by plaintiffs, greater effect on their certificates, or diversity of the class affected by the regulation is sufficient to justify a departure from *American Airlines* is better left for trial on the merits. 381 F. Supp. at 186.

After considering this case in greater detail, the court concludes that the rationale of *American Airlines* is applicable to the instant case.

In *American Airlines* the plaintiffs, as in this case, argued that the CAB action constituted an amendment to their certificates which could be done only by adjudication. Plaintiffs in the instant case argue that *American Airlines* is distinguishable because plaintiffs' argument in *American Airlines* was "palpably without merit." However, Judge, now Chief Justice, Burger, joined by two other Judges, each felt that the issue presented by the case was one of amending certificates by rule making. And in *National Petroleum Refiners Association* v. *FTC,* 482 F.2d 672, 679 (D.C. Cir. 1973), this Circuit described *American Airlines* as a case in which the CAB could "utilize substantive rules affecting allocation of air cargo business among different types of air carriers to modify existing certificates without the full adjudicatory hearing contemplated by the agency's statute." This court finds *American Airlines'* rationale to be indistinguishable from and applicable to the instant case.

In this case plaintiffs have not even attempted to show how an adjudicatory hearing would have better protected their alleged rights. Rather, it appears clear that here, as in *American Airlines, supra* at 629-31, the agency was concerned with policy rule making rather than focusing on evidentiary facts relating to a particular party. Here, as in *American Airlines,* the proposed rule was applicable to an entire class of certificate holders. Plaintiffs have argued that since some irregular-route motor carriers may continue to tack under the new rule and others may not depending on the degree of circuity, that the rule does not apply to an entire class and that adjudicatory safeguards

should have been applied. However, the Supreme Court recently in *United States* v. *Florida East Coast Railway,* 410 U.S. 224, 245-46 (1973), dealt with the question of when an order or rule has general applicability.

> Here the incentive payments proposed by the Commission in its tentative order, and later adopted in its final order, were applicable across the board to all of the common carriers by railroad subject to the Interstate Commerce Act. No effort was made to single out any particular railroad for special consideration based on its own peculiar circumstances. Indeed, one of the objections of appellee Florida East Coast was that it and other terminating carriers should have been treated differently from the generality of the railroads. But the fact that the order may in its effects have been thought more disadvantageous by some railroads than by others does not change its generalized nature.

Similarly, in the instant case certain irregular-route motor carriers feel more disadvantaged by the rule than others but that does not change the fact that the gateway elimination rule applies equally to all carriers. As stated in *American Airlines, supra* at 631, "each carrier is protected by the fact that it cannot be disadvantaged except as the Board takes action against an entire class."

In the instant case it is indeed true that carriers, as a result of the ICC rule, will now be forced to stop tacking unless special permission is obtained. However, this is not such a circumstance as would distinguish *American Airlines.* The *American Airlines* court, in explaining the rationale enunciated by the Supreme Court in *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192 (1956), stated

> [T]he *Storer* doctrine . . . rests on a fundamental awareness that rule making is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy in guiding the future development of industries subject to intensive administrative regulation in the public interest, and that such rule making is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making. 359 F.2d at 629.

The court finds that elimination of gateways by rule making was an appropriate exercise of the ICC's rule making authority and the decision appealed from will be affirmed.

CARL MCGOWAN
United States Circuit Judge

JOSEPH WADDY
United States District Judge

THOMAS A. FLANNERY
United States District Judge

April 28, 1975

APPENDIX B

Judgment

(Filed April 28, 1975)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-860

THOMPSON VAN LINES, INC., and
ALEXANDER B. POLLOCK, d/b/a JIFFY VANS,

Plaintiffs,

—v.—

UNITED STATES OF AMERICA and the
INTERSTATE COMMERCE COMMISSION,

Defendants.

This matter having come before the court on complaint and prayer for relief, and the court having considered the record and memoranda submitted by counsel, and it appearing for the reasons stated in the court's memorandum opinion filed herein today that the decision of the Interstate Commerce Commission should be affirmed, it is by the court this 28th day of April, 1975,

ORDERED AND ADJUDGED that plaintiffs' complaint be, and the same hereby is, dismissed; and it is further

ORDERED AND ADJUDGED that judgment be entered in favor of defendants.

CARL MCGOWAN
United States Circuit Judge

JOSEPH WADDY
United States District Judge

THOMAS A. FLANNERY
United States District Judge

APPENDIX C

Notice of Appeal to the Supreme Court of the United States

(Filed June 17, 1975)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-860

THOMPSON VAN LINES, INC., and
ALEXANDER B. POLLOCK, d/b/a JIFFY VANS,

Plaintiffs,

—v.—

UNITED STATES OF AMERICA and the
INTERSTATE COMMERCE COMMISSION,

Defendants.

Notice is hereby given that Thompson Van Lines, Inc. and Alexander B. Pollock, d/b/a Jiffy Vans, the plaintiffs above named, hereby appeal to the Supreme Court of the United States from a final order and judgment of a three-judge District Court dismissing the plaintiffs' complaint, entered in this action on April 28, 1975.

This appeal is taken pursuant to 28 U.S.C. §1253.

Dated: June 11, 1975

HERBERT BURSTEIN
Attorney for Thompson Van Lines, Inc. and Alexander B. Pollock d/b/a Jiffy Vans
2373 One World Trade Center
New York, New York 10048
(212) 432-0940

APPENDIX D

Order Extending Time to Docket Appeal to September 15, 1975

(August 12, 1975)

SUPREME COURT
OF THE UNITED STATES

No. A-112

THOMPSON VAN LINES, *et al.*,
Appellants,

—v.—

UNITED STATES and
INTERSTATE COMMERCE COMMISSION.

UPON CONSIDERATION of the application of counsel for appellants,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including September 15, 1975.

WARREN E. BURGER
Chief Justice of the United States

Dated this 12
day of August, 1975

APPENDIX E

Statutes Involved

Interstate Commerce Act

Issuance of Certificate

Sec. 207. [*August 9, 1935*] [*49 U. S. C. §307*] (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

Terms and Conditions of Certificate

Sec. 208. [*August 9, 1935, November 10, 1966.*] [*49 U. S. C. 308.*] (a) Any certificate issued under section 206 and 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which,

and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

Suspension, Change, Revocation, and Transfer of Certificates, Permits, and Licenses

Sec. 212. [*August 9, 1935, amended June 29, 1938, September 18, 1940, August 22, 1957, October 15, 1966.*] [*49 U. S. C. §312.*] (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regula-

tion promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

ADMINISTRATIVE PROCEDURE ACT

SEC. 558. IMPOSITION OF SANCTIONS; DETERMINATION OF APPLICATIONS FOR LICENSES; SUSPENSION, REVOCATION, AND EXPIRATION OF LICENSES [*5 U. S. C. §558.*]

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal of a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

APPENDIX F

Order

Title 49—Transportation
Chapter X—Interstate Commerce Commission
Subchapter A—General Rules and Regulations
Part 1065—Gateways and Tacking—Irregular Route
Motor Common Carriers of Property

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 15th day of February 1974.

Ex Parte No. 55 Sub-No. 8)

MOTOR COMMON CARRIERS OF PROPERTY,
ROUTES AND SERVICE

(Petition for the Elimination of Gateways by Rulemaking)

It appearing, That by joint petition filed March 21, 1973, 42 motor common carriers requested this Commission to institute a rulemaking proceeding to investigate the possibility of promulgating regulations which would permit all motor carriers to operate directly between any two points they are authorized to serve, without the necessity of observing any of their presently required gateways; and that on November 23, 1973, this Commission issued a Notice of Proposed Rulemaking and Order, 119 M.C.C. 170 (dated November 15, 1973), in this proceeding which set forth certain provisional findings on the matters involved and which invited comments on those tentative findings;

And it further appearing, That investigation of the matters and things involved in this proceeding has been made and that the Commission has made and filed its report herein containing its findings of facts and conclusions thereon, which report is hereby referred to and made a part hereof;

It is ordered, That Chapter X of Title 49 of the Code of Federal Regulations be, and it is hereby, amended by adding a new part 1065 reading as set forth in appendix B to the said report.

It is further ordered, That this order shall become effective on April 5, 1974, and shall remain in effect until modified or revoked in whole or in part by further order of the Commission.

And it is further ordered, That notice of this order shall be given to the general public by depositing a copy thereof in the Office of the Secretary of the Commission at Washington, D.C., and by filing a copy with the Director, Office of the Federal Register. (49 U.S.C. 301, 302, 304, and 308, 5 U.S.C. 553 and 559.)

By the Commission.

Robert L. Oswald,
Secretary.

(Seal)

Rules of Interstate Commerce Commission

The adopted rules

[49 CFR CHAPTER X]

Section 1065. *Gateways and tacking—irregular-route motor common carriers of property.*

(a) Where a common carrier by motor vehicle authorized to transport property in interstate or foreign commerce holds separate and unrestricted irregular-route certificated authorities issued by the Interstate Commerce Commission, which authorities have a common point of service (a "gateway") to which a given shipment may be transported under one authority and from which the same shipment may be transported under the other, the carrier is *required,* upon reasonable request therefor, to furnish through service on the shipment under a combination of the authorities and *may* do so without transporting the shipment through the common service point or points; *provided*: (1) that the certificated authorities so utilized were issued *to the carrier* pursuant to an application proceeding pending before the Interstate Commerce Commission on or before November 23, 1973, (2) that none of the authorities is restricted against such joining, (3) that the most direct highway distance between the points[1] to be

[1] In those cases where a carrier may serve a municipality or unincorporated community pursuant to this rule without the necessity of observing a gateway specified in its certificated authorities, the carrier shall serve all points within its terminal area at such municipality or unincorporated community in accordance with 49 CFR 1049.

served is not less than 80 percent of the highway distance between such points over the carrier's authorized routing through the gateway, (4) that a lawful and appropriate tariff covering the movement via the gateway was on file with the Interstate Commerce Commission on November 23, 1973, or that the carrier had pending an application on the aforementioned date which was subsequently granted, and (5) the carrier follows the procedures prescribed in paragraph (d)(1) below.

(b) Except where expressly allowed under paragraph (a) above, or on movements of 300 miles or less, or where its certificated authorities specifically authorize such tacking or joinder, a common carrier by motor vehicle authorized to transport property, in interstate or foreign commerce, is prohibited from joining any of its irregular-route certificated authorities on and after the effective date of this regulation. Any common carrier by motor vehicle providing such prohibited service on or before the date this regulation takes effect shall cease such operations on or before the 60th day following the said effective date, unless it files an application for direct-service operating authority pursuant to section 206 of the Interstate Commerce Act on or before the 60th day following the effective date. Such an application *may* have the suport of the shipper or shippers currently served by the carrier applicant, *shall* be filed and processed in accordance with the procedures prescribed in paragraph (d)(2) below, and *shall* be determined in accordance with the requirements of section 207 of the Interstate Commerce Act giving full effect to the applicant's past service and operations through the gateway. Any such carrier filing such an application in good faith may continue to provide such service by observ-

ing its gateways or gateway until final disposition of its application proceeding.

(c) The mileages utilized in determining whether the most direct highway distance between the points to be served is not less than 80 percent of the highway distance between such points over the carrier's authorized routing through the gateway, shall be calculated from the point of origin (i.e., the point on the carrier's authorized route where the shipment begins its journey) to the point of destination (i.e., the point on the same carrier's authorized route where the shipment ends its journey) of the shipment or shipments involved.

(d)(1) A carrier seeking to eliminate gateways pursuant to paragraph (a) above shall be required to adhere to the following procedures:

(i) file a letter and two copies thereof with this Commission at its offices in Washington, D.C., and one copy with this Commission's field office having jurisdiction over the point at which the carrier is domiciled, describing the gateways to be eliminated (this should include origin, destination, and gateway, applicable mileages, and a suitable map), and attaching either (A) copies of appropriate tariff provisions establshing that such through services were offered by the carrier on November 23, 1973, or (B) a verified statement establishing that the certificated authority enabling operations through the gateway were issued *to the carrier* pursuant to an application proceeding pending before the Interstate Commerce Commission on November 23, 1973.

(ii) allow 15 days from the date of publication in the Federal Register of a notice of the carrier's intention to

eliminate its gateways and for Commission review of the letter submission. Protests to such notices must be received at the Commission at Washington, D.C., within 10 days of the date of that publication. If the carrier is not otherwise informed by this Commission, operations may commence at the termination of the said 15-day period. This Commission reserves the right to require that a carrier terminate these operations if it should later be discovered that the carrier's operations do not qualify for the benefits of this rule.

(iii) Letter submissions under this rule will not be accepted after May 15, 1974, except in those cases in which the certificated authority to be joined was issued pursuant to an application proceeding pending before the Interstate Commerce Commission on November 23, 1973. In such instances, the carrier shall make such filing within 60 days from the date of issuance of the authority in issue.

(2) A carrier that maintains gateway operations which do not meet the criteria set forth in paragraph (a) above may, if it desires to continue to provide such through service to the public, file OP-OR-9 applications with this Commission seeking direct-service authority. Such an application *shall* include:

(i) in bold print in the upper right-hand corner of page 1, the words GATEWAY ELIMINATION.

(ii) (A) A carrier relying on certificated authorities issued to it on or prior to November 23, 1973, shall submit copies of appropriate tariff provisions establishing that such through services were offered by the carrier on November 23, 1973.

(B) A carrier relying on certificated authorities issued to it after November 23, 1973, as a result of an application pending on that date shall present verified statements establishing either (1) that the service through the gateway point has been performed (as in the case of the carrier's demonstrated participation in deteriorating interline or interchange service) on November 23, 1973, or (2) that a public need for such through service exists.

(iii) an initial verified statement in support of the application. This should include all of the evidence applicant plans to present in the proceeding, including (to the extent pertinent) evidence of the applicant's (or its established predecessor-in-interest's) past operations via the gateway for the 2 year preceding November 23, 1973, and the relevant matters and evidence set forth in subparagraph (ii) above. Evidence of supporting shippers need not be presented except as set forth in (ii)(B) above, but will be considered and accorded appropriate weight if submitted.

(iv) Such applications must be filed on or before the 60th day following the effective date of these regulations, or within 60 days following the date of issuance of the certificated authorities so to be joined if such authorities are issued to the carrier pursuant to an application proceeding pending before the Interstate Commerce Commission on November 23, 1973, whichever date last occurs. The application will be processed in accordance with the normal procedures of the Interstate Commerce Commission as modified in the Federal Register publication of a notice of the filing of such applications (which shall reflect the procedure outlined in the Commission's report and order in *Gateway Elimination,* 119 M.C.C. 530).

(e) Any motor carrier which has pending on the effective date of these regulations an application for the elimination of a gateway and which desires to utilize the rules set forth above, should notify the Director of the Office of Proceedings of the Interstate Commerce Commission of the pendency of such application and should include the pertinent docket number. Duplicate applications should not be filed.